Article

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FROM NORMS TO FACTS: THE REALIZATION OF RIGHTS IN COMMON AND CIVIL PRIVATE LAW

Helge Dedek[*]

Every legal system that ties judicial decision making to a body of preconceived norms has to face the tension between the normative formulation of the ideal and its approximation in social reality. In the parlance of the common law, it is, more concretely, the remedy that bridges the gap between the ideal and the real, or, rather, between norms and facts. In the common law world—particularly in the United Kingdom and the Commonwealth—a lively discourse has developed around the question of how rights relate to remedies. To the civilian legal scholar—used to thinking within a framework that strictly categorizes terms like substance and procedure, subjective right, action, and execution—the concept of remedy remains a mystery. The lack of "remedy" in the vocabulary of the civil law is more than just a matter of attaching different labels to functional equivalents, it is the expression of a different way of thinking about law. Only if a legal system is capable of satisfactorily transposing the abstract discourse of the law into social reality does the legal machinery fulfill its purpose: due to the pivotal importance of this translational process, the way it is cast in legal concepts thus allows for an insight into the deep structure of a legal culture, and, convergence notwithstanding, the remaining epistemological differences between the legal traditions of the West. A mixed jurisdiction must reflect upon these differences in order to understand its own condition and to define its future course.

Tout système juridique qui lie la prise de décision judiciaire à un ensemble de normes préconçues doit faire face à la tension qui existe entre la formulation normative d'un idéal et son approximation dans la réalité sociale. Dans la terminologie de la *common law*, c'est le remède, plus concrètement, qui palie l'écart entre l'idéal et le réel, ou plutôt, entre les normes et les faits. Dans les juridictions de *common law*, plus particulièrement au Royaume-Uni et au sein du Commonwealth, un vif débat est apparu sur les liens que les droits entretiennent avec les remèdes. Pour le juriste civiliste, habitué à raisonner dans un cadre qui catégorise strictement des termes tels que substance et procédure, droit subjectif, action et exécution, le concept de remède demeure un mystère. L'absence de « remèdes » dans le vocabulaire du droit civil n'est pas une simple question de nomenclature divergente pour décrire des équivalents fonctionnels. Il s'agit de l'expression d'une façon différente d'aborder le droit. L'appareil juridique n'atteindra ses objectifs que s'il est capable de transposer le discours abstrait du droit en réalité sociale. Étant donné l'importance primordiale de ce processus de transposition, son expression dans des concepts juridiques révèle la structure profonde d'une culture juridique et les différences épistémologiques qui subsistent entre les traditions juridiques occidentales, malgré leur convergence. Une juridiction mixte doit réfléchir sur ces différences afin de comprendre son propre état et de définir son parcours futur.

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I. The Question[1]

"Law", writes Professor Paul Gewirtz, "mediates between the ideal and the real."[2] In the parlance of the common law it is, more concretely, the *remedy* that bridges the gap between the ideal and the real, or, rather, between norms and facts. Remedies realize rights; as the etymology of the term reveals, remedies are supposed to provide the tangible cure, to heal what the law conceptualizes as an injury—the violation of an abstract right. Remedies translate the abstract and lofty discourse of the law into the life-world of the disputants.

Every legal system that somehow ties judicial decision-making to a body of pre-formulated norms that, in other words, has evolved beyond a model of spontaneous administration of substantive justice, has to face the tension between the normative formulation of the ideal and its approximation in social reality.[3] This problem cuts across the dividing lines between legal cultures and traditions. Such commonality, however, does not preordain the way a legal tradition captures this tension in theoretical terms and doctrinal concepts. In this context, I have been asked to answer a concrete and concise question: Do the common law and civilian traditions differ in their approach to the relationship between rights and remedies, and if so, how?

This is not a simple inquiry, and it is even less simple, it seems to me, to find an answer that will do it justice. If a comparative lawyer were asked to boil down the complexities to a single catchphrase the answer would probably look something like this: in the common law the remedy is said to precede the right, *ubi remedium, ibi ius*; whereas in the civil law

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1 An earlier version of this paper was presented at the 2009 annual conference of the Canadian Institute for the Administration of Justice ("Taking Remedies Seriously"). I would like to thank Robert J Sharpe J for his kind invitation. The participants of the first panel ("Private Law and the Remedial Imagination: The Relationship between Rights and Remedies"), which was chaired by Robert J Sharpe, were called upon to respond to specific questions. My co-panellist Stephen A Smith addressed the question "Are rights and remedies properly understood as discrete and distinct elements or are they inextricably bound? Why does the nature of the right-remedy relationship matter?" I had been asked to introduce a comparative angle and to address the question "Do the common law and civilian traditions differ in their approach to the relationship between rights and remedies, and if so, how?"

2 Paul Gewirtz, "Remedies and Resistance" (1983) 92:4 Yale LJ 585 at 587.

3 Describing a kind of judicial decision-making that does not follow a rational grid of pre-formulated rules and principles, Max Weber famously popularized the expression "*Kadi*-justice": Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed by Guenther Roth & Claus Wittich (Berkeley: University of California Press, 1978) vol 2, 976 [emphasis in original] (using the expression, as has been pointed out by scholars of Islamic law, in a proverbial rather than an historically accurate way).

the right is said to precede the remedy, *ubi ius, ibi remedium*.[4] Despite the apparent triteness of this summary, I maintain that there is not only truth to this aphorism, but that it stands as a synecdoche for a fundamental epistemological difference between the common law and the civil law traditions—a diagnosis that begs the further question: how does a mixed jurisdiction such as Quebec position itself in relation to this dichotomy?

The different answers given to the question whether rights "come before the remedies"[5] (or vice versa) reflect a difference in how common lawyers and civilians imagine, conceptualize, and think about law. Despite phenomena of "functional convergence", cultural differences that burden the communication between lawyers on both sides of the common law–civil law divide remain.[6] Notably, the civilian tradition approaches law not as a historical sequence of court-ordered sanctions affecting the life of the disputants, but as an abstract normative system to be treated in a "scientific" manner.

However, before even asking whether there is something such as an approach to the rights-remedies relationship that is typical of the common or civil law tradition, we first have to find out whether the respective traditions are even equally familiar with the notions of "rights" and "remedies". On the one hand, it is well known that comparatists have maintained that the common law has traditionally entertained a notion of right in a private law context that deviates from the (in)famous Continental "subjective right"—*droit subjectif* or *subjektives Recht*.[7] On the other hand, we witness a certain helplessness that overcomes the "true" civilian when grappling with the common law concept of "remedy" in all its historical

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4 See e.g. William Tetley, "Mixed Jurisdictions: Common Law v Civil Law (Codified and Uncodified)" (2000) 60:3 La L Rev 677 at 707; Éric Descheemaker, "Faut-il codifier le droit privé européen des contrats?" (2002) 47:4 McGill LJ 791 at 808; Denis Tallon, "L'inexécution du contrat: pour une autre présentation" [1994] RTD civ (2d) 223 at 224; René David & John EC Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed (London: Stevens & Sons, 1985) 316-17; Geoffrey Samuel, *Law of Obligations and Legal Remedies*, 2d ed (London: Cavendish, 2001) at 90 [Samuel, "Legal Remedies"]; JA Jolowicz, *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) at 83.

5 The question cannot be viewed as a matter of historical or even logical precedence; the question of which precedes the other, approached in such an ontological manner, resembles the question of which comes first: the chicken or the egg. See Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005) at 57.

6 See e.g. Pierre Legrand, "European Legal Systems Are Not Converging" (1996) 45:1 ICLQ 52 at 60ff.

7 Geoffrey Samuel, "'Le Droit Subjectif' and English Law" (1987) 46:2 Cambridge LJ 264 [Samuel, "English Law"]; FH Lawson, "'Das subjektive Recht' in the English Law of Torts" in *Many Laws: Selected Essays*, vol 1 (Amsterdam: North-Holland, 1977) 176 [Lawson, "Das subjektive Recht"].

and theoretical implications; used to thinking within a framework that strictly categorizes terms like substance and procedure, subjective right, and action and execution, the concept of remedies remains a mystery to the civilian. The French civilian Denis Tallon once remarked at the outset of a report on remedies for breach of contract that "the French reporter is confronted with a terminological difficulty which, as always, reflects a more fundamental problem: *what is a 'remedy'?*"[8] The French *recours*, which is translated in the English language version of the *Civil Code of Québec* as "remedy"[9] or the German *Rechtsbehelf*, seem *prima vista*, to describe legal institutions of which one can avail oneself—rather than a remedy in the sense of a cure that it is administered by a court.[10] Such fundamental differences—terminological, conceptual, epistemological—foreshadow the problems a Quebec judge or practitioner of private law faces when operating within a framework of substantive law that is civilian and a law of procedure that is strongly influenced by the common law.

II. Remedies and Rights in the Common Law

Our first task is to briefly outline the approach of "the" common law tradition to the rights-remedies relationship. We have to differentiate between an empirical, factual description of how the common law tradition has dealt with this problem in its history, and what legal theorists and philosophers have argued ought to be the proper answer to the eternal question of how rights relate to remedies. Both approaches, however, are made even more complicated by the fact that it is far from clear what a remedy actually is.

A. Traditional Pragmatism and the "Remedial Approach"

Common lawyers tend—proudly—to portray themselves as gravitating towards a pragmatist approach. Unlike the civilian, who is more academically inclined and weighed down by doctrinal theorization, the common lawyer has traditionally cared about what actually matters; he emphasizes outcome, actual results rather than idle theory. In the context of a civil action, what matters is, arguably, the remedy. In his 1955 article

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8 Denis Tallon, "Remedies: French Report" in Donald Harris & Denis Tallon, eds, *Contract Law Today: Anglo-French Comparisons* (Oxford: Oxford University Press, 1989) 263 at 263 [Tallon, "Remedies"] [emphasis added].

9 See e.g. arts 484, 593, 1397, 1477, 1491, 1529, 1532, 1534, 1535, 1560, 1624, 1625, 1669, 1692, 1955, 2017, 2055, 2181, 2204 CCQ But see arts 1743, 1863 CCQ. The *Civil Code of Québec* uses "remedy" in the sense of a remedial right rather than in the sense of court order.

10 For further details, see Part III.1(b), below.

"The Law of Remedies as a Social Institution" Professor Charles Wright wrote, "Civil actions are not brought to vindicate nice theories as to negligence or nuisance or consideration."[11] The tone of this quote, as well as the title of Wright's essay, gives us a sense of the appeal the topic of remedies exerts on a jurisprudence that would rather look at outcomes and consequences than preoccupy itself with doctrinal minutiae. Remedies, in the sense of *that which matters*, are the topic of choice of the realist and the pragmatist.[12] This explains the proliferation of courses, casebooks, and textbooks, as well as scholarly works on remedies, particularly in the United States in the second half of the twentieth century.

The rest of the common law world, however, could not resist the attraction either; in 1983, Professor Waddams pointed out the growing interest in the "legal subject" of remedies, expressed in the production of books and articles and the offering of courses.[13] And is it not a hallmark of the English common law tradition that it "typically ... fastens, not upon principles but upon remedies"?[14] Prima facie, this observation seems to hold true as well regarding the relationship, as traditionally understood, between remedies and rights. Despite the plethora of theoretical questions that spring to mind when reflecting even perfunctorily on the relationship between remedies and rights—after what we have learned so far—we can surmise that common lawyers engage in such theoretical discussions with rather curbed enthusiasm.[15] P.S. Atiyah writes, "English law has for long prided itself in being strong on remedies, even if it is less interested in rights."[16]

The reason for this tendency is usually said to be found in the history and structure of the common law. The common law developed within a procedural framework of causes of actions—a structure, interestingly

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11 Charles Alan Wright, (1955) 18:4 U Det LJ 376 at 377.

12 FH Lawson, *Remedies of English Law*, 2d ed (London: Buttersworth, 1980) at 1.

13 SM Waddams, "Remedies as a Legal Subject" (1983) 3:1 Oxford J Legal Stud 113 at 113.

14 *Davy v Spelthorne BC*, [1984] 1 AC 262 at 276, [1983] 3 WLR 742 (HL), Wilberforce LJ.

15 See also Albert Kiralfy, "Law and Right in English Legal History" (1985) 6:1 J Legal Hist 49. Kiralfy assesses that "[t]he attitude of the English lawyer towards his law as an institution independent of the machinery of its creation is ambiguous" (*ibid* at 49).

16 PS Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987) at 21. See also, on the historical usage of "right" in English common law history; Kiralfy, *supra* note 15 at 57-60; Lawson notes that English lawyers, though using the term right, usually do not attach to it some form of metaphysical significance ("Das subjektive Recht", *supra* note 7 at 177).

enough, phenotypically very close to classical Roman law.[17] Roman law, however, observed a different kind of taxonomical logic, which in turn provided the syntax for a Continental legal science that eventually developed the strict separation between substance and procedure.[18] In the English common law, it was not until the abolition of the *Common Law Procedure Act* of 1852 that the question of a division between substance and procedure became an issue of practical relevance.[19] Although the theoretical separation between procedure and substance exists in common law thought, "when it comes to remedies," as Geoffrey Samuel observed, "this distinction can break down as a result of the legacy of the forms of action which themselves defined substantive ideas mainly through formal rules of procedure."[20] Scholarly attempts at theoretical elucidation notwithstanding, in light of this legacy, traditional discourse (a) was more likely to develop a rhetoric that focused on the actual relief, the remedy to cure the plaintiff's grievance, granted by a judge; and (b) had no need to engage in a clear distinction between substance and procedure when it came to remedies.[21] This is seen—by some—as the very character of common law remedies: "The law of remedies falls somewhere between substance and procedure, distinct from both but overlapping with both," as Douglas Laycock put it.[22]

B. Remedies and Rights: The Theoretical Debate

This narrative may appear as an accurate description of the traditional way the common law approached the relationship between right and remedy (which displayed, as Atiyah has reminded us, a certain lack of interest in the definition of substantive rights); yet, many authors would disagree that this is an accurate description of how remedies ought to be

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17 Although not accurate on all accounts, the *locus classicus* for this observation is Fritz Pringsheim, "The Inner Relationship Between English and Roman Law" (1935) 5:3 Cambridge LJ 347.

18 For a more detailed reflection on this topic, see Part II, below.

19 *Common Law Procedure Act*, 1852 (UK), 15 & 16 Vic, c 76. Of course, "[t]he final blow was struck by the Judicature Act of 1873": FW Maitland, *The Forms of Actions at Common Law: A Course of Lectures*, ed by AH Chaytor & WJ Whittaker (Cambridge: Cambridge University Press, 1936) at 8. See also Geoffrey Samuel, "Public and Private Law: A Private Lawyer's Response" (1983) 46:5 Mod L Rev 558, 562ff; Jolowicz, *supra* note 4 at 83, n 7.

20 Samuel, "Legal Remedies", *supra* note 4 at 40.

21 Lawson, "Das subjektive Recht", *supra* note 7 at 178.

22 Douglas Laycock, *Modern American Remedies: Cases and Materials*, 3d ed (New York: Aspen, 2002) at 1. See generally Doug Rendleman, "Remedies—The Law School Course" (2001) 39:3 Brandeis LJ 535 at 535; David M Walker, *The Law of Civil Remedies in Scotland* (Edinburgh: W Green & Son, 1974) at v.

perceived. We need to remind ourselves that, as comparatists, confronted with the question of how "the" common law tradition approaches the rights-remedies relationship, we need to distinguish carefully between an empirical and a normative answer to this question, between what seems to be an adequate empirical description of common law discourse and the postulates of legal theorists as to how remedies—and their relationships to rights—ought to be understood.

1. Rights in Private Law Discourse

First of all, we have to be mindful not to fall prey to the stereotype that "the" common law has not been or is not interested in rights. The common law is obviously familiar with a private law discourse of rights.[23] Particularly in recent times, the rights-side of the rights-remedies dichotomy has attracted more and more attention that has elicited not only academic but also important judicial statements. A prominent example comes to mind: Lord Diplock's famous distinction between primary and secondary rights and obligations arising from a contract, his subtle subdistinctions as to the different species of primary rights, and the implications for the administration of remedies.[24]

The fact that we encounter the distinction between "primary rights" and "sanctioning rights" (secondary rights arising from "civil delicts") in the work of John Austin, underlines that English jurisprudence does indeed have a longstanding tradition of focusing on the role of rights in private law and their relationship to remedies.[25] The term right might not come with the same semantic implications as *droit subjectif* (insofar as it does not emphasize or imply an antagonism of subjective and objective); right might also not range as high in the metaphysical pantheon of concepts as *droit subjectif* does in the civil law tradition. However, although it is popular to point out that there is no such thing as the civilian *droit subjectif* or *subjektives Recht* in the common law, we must be careful not to deny the significance of rights in the common law discourse of private

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[23] For a historical perspective, see Kiralfy, *supra* note 15 at 57-60.

[24] See e.g. *Lep Air Services Ltd v Rolloswin Investments Ltd*, [1973] AC 331 at 350, [1972] 2 WLR 1175 (HL); *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1966] 1 WLR 287, 1 All ER 309 (CA); *C Czarnikow Ltd v Koufos (The Heron II)*, [1966] 2 QB 695, 2 WLR 1397 (CA). See also Brice Dickson, "The Contribution of Lord Diplock to the General Law of Contract" (1989) 9:4 Oxford J Legal Stud 441 at 448.

[25] *C.f.* John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, 5th ed by Robert Campbell (London: John Murray, 1885) vol 2 at 760ff.

law.[26] Since the days of Hale and Blackstone,[27] English jurists map out private law by squaring two dichotomies: rights and wrongs[28] on the one hand and rights and remedies on the other.[29]

With the recent rise of remedies as a popular topic in academia, legal theorists in the Commonwealth have shown a renewed interest in the rights-remedies relationship: traditionally not quite so smitten with the pragmatist stance fairly common among legal scholars in the United States, they have reacted to the popularity of "remedies as a legal subject" by aiming at theoretical explanations of how remedies relate to rights.[30] The works of Peter Birks, Robert Stevens, Lionel Smith, Stephen Smith, and Ernest Weinrib (to name just a few) stand witness to this academic interest in a rights-based theory of remedies.[31] This, of course, fits into the

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[26] Samuel states: "[n]o doubt for the Continental lawyer the subjective right has always had at bottom the politico-legal flavour which is only now becoming more overt in English case-law" ("English Law", *supra* note 7 at 266). I would rather venture to say that the Continental private *lawyer* perceives the "subjective right" as part of the technical arsenal of private law doctrine, without much more flavour (or *haut-goût*) than "right" to the common lawyer.

[27] See Sir Matthew Hale, *The History of the Common Law of England, And An Analysis of the Civil Part of the Law,* 6th ed by Charles Runnington (London: Butterworth, 1820); William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1763* (Chicago: University of Chicago Press, 1975) vol 1 [Blackstone, *Commentaries*, vol 1]. For a particular reading of the rights-wrongs and rights-remedies distinction, *c.f.* Alan Watson, "The Structure of Blackstone's Commentaries" (1988) 97:5 Yale LJ 795 (explaining the influence of Hale's work, and of continental Roman law scholarship).

[28] See Blackstone, *Commentaries*, vol 1, *supra* note 27 at 117ff. "Right," in this context, is at first not used in the sense of an individual entitlement, but in the sense of a state of *what is right*. A similar ambivalence can be observed in the usage of *ius* in Roman law: see Donahue, *infra* note 83.

[29] Blackstone actually states that whenever a right is invaded, there is a remedy: William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (Chicago: University of Chicago Press, 1979) vol 3 at 23ff [Blackstone, *Commentaries*, vol 3]. Note, however, that Blackstone did not yet think in the terms of Austin's secondary rights—Blackstone's concept of rights remains, as Birks called it, "superstructural" (Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20:1 Oxford J Legal Stud 1 at 5 [Birks, "Rights, Wrongs"]).

[30] *C.f.* Neil Duxbury, "English Jurisprudence Between Austin and Hart" (2005) 91:1 Va L Rev 1 at 55.

[31] See e.g. Birks, "Rights, Wrongs", *supra* note 29; Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); Lionel Smith, "Restitution: The Heart of Corrective Justice" (2001) 79:7 Tex L Rev 2115; Stephen A Smith, "The Law of Damages: Rules for Citizens or Rules for Courts?" in Dajkhongir Saidov & Ralph Cunnington, eds, *Contract Damages: Domestic and International Perspectives* (Oxford: Hart, 2008) 33 [Smith, "Damages"]; Stephen A Smith, "The Rights of Private Law" in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart, 2009) 113 [Smith,

bigger picture of a private law discourse that, contrary to American utilitarianism, is taking rights seriously and is trying to ground the positive law in a theory of rights.[32] If we take account of the amount of scholarly writing produced, it seems fair to say that, in this day and age, there exists a more vivid academic discourse on the topic of rights—and their relationship to remedies—in common law jurisdictions than in the civil law world. Furthermore, the theories offered by scholars such as Weinrib and Smith aim at explaining the "true" character of private law through a rights-based approach; if we take these scholars by their word, if we do take the rights-based theories seriously, we cannot simply stick to the cliché that the common law is concerned with remedies rather than rights.

2. The Quest for a Rights-Remedies Taxonomy

Instead of giving a detailed account of the sophisticated theories on the rights-remedies relationship, I shall briefly depict—in a rather simple manner—the intellectual landscape of those theories as a continuum that spans from an extreme remedial approach at one end to an extreme rights-based approach at the other. For the purpose of our inquiry, this exercise is important insofar as it will show that the theoretical standpoint determines the respective definitions of remedies and rights—which is, as we will see, a valuable insight for our comparative project.

Let us start with the remedies end of the continuum. It is, at the same time, the pragmatist pole. Here the remedy defines the right; the right has no ontological existence as a "valid" deontic command. A "right" is simply the word used to describe a factual position that is protected by institutional safeguards, such as court orders: "'Right,' *pragmatically,* thus means 'remedy.'"[33] In its simplest and purest form, this view has of course been expounded by O.W. Holmes, who argued against an understanding of the law as a system of "pre-existing" rights and duties as deontic entities: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[34] The remaining importance of

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"Rights"]; Ernest J Weinrib, "Two Conceptions of Remedies" in Charles EF Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart, 2008) 3.

[32] See e.g. Ernest J Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995); Stephen A Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) [Smith, "Contract Theory"]; Smith, "Rights," *supra* note 31, *passim*.

[33] David Stevens, "Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things" (1989) 39:3 UTLJ 258 at 285 [emphasis in original].

[34] OW Holmes, "The Path of the Law" (1897) 10:8 Harvard L Rev 457 at 462. Holmes is often presented as a radical, a maverick; however, along the same lines, see Arthur L Corbin, "Legal Analysis and Terminology" (1919) 29:2 Yale LJ 163 at 164:

such legal consequentialism lies obviously in breaking the path for efficiency-oriented theories of law, which represent some of the most influential strains of contemporary legal thought, particularly in the United States.[35] Returning to our rights-remedies discourse, this approach, in the terminology suggested by Grant Hammond, could be called "monist". In such a remedial monism right is mostly eclipsed and consumed by remedy.[36] The remedy is what matters; saying that there was a right is just another way of saying that a remedy has actually been granted.

At the other end of the continuum, however, the concept of right reigns supreme. Since the remedial monist is unconcerned with rights as a category, there is simply no need for a sharp definition of remedy. Acknowledging the importance of rights, however, leads to the necessity to define both concepts in their relationship to each other. We could think of a rights monism that dispenses with remedy as a meaningful category altogether: when rights alone matter, remedy can be seen as a non-technical term to describe every response of the legal system to some sort of grievance in need of a cure, be it substantive or procedural in nature.

Peter Birks has argued against such use of the terminology: wherever the law grants a right, it should be called by its proper name—also in matters terminological, right should prevail over remedy.[37] In search of a remaining technical meaning of remedy, thus acknowledging a theoretical dichotomy or "dualism"[38] of right and remedy, it is only natural to define remedy narrowly in a way that leaves matters of substance to the concept of right and relegates remedy to its factual implementation. Smith and Zakrzewski, accordingly, define remedy as court orders.[39] The rights-based approach seems to gravitate towards a procedural understanding of

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> When we state that some particular legal relation exists we are impliedly asserting the existence of certain facts, and we are expressing our present mental concept of the societal consequences that will normally follow in the future. A statement that a legal relation exists between A and B is a *prediction* as to what society, acting through its courts or executive agents, will do or not do for one and against the other.

35 See Richard A Posner, *Law, Pragmatism, and Democracy* (Cambridge, Mass: Harvard University Press, 2003) at 76-79.

36 Grant Hammond, "Rethinking Remedies: The Changing Conception of the Relationship between Legal and Equitable Remedies" in Jeffrey Berryman, ed, *Remedies: Issues and Perspectives* (Scarborough, Ont: Carswell, 1991) 87 at 90.

37 Birks, "Rights, Wrongs", *supra* note 29 at 19-22.

38 *C.f.* Hammond, *supra* note 36 at 90-91.

39 Zakrzewski, *supra* note 5 at 43. See also Stephen A Smith, "Rights and Remedies: A Complex Relationship" in Robert J Sharpe & Kent Roach, eds, *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 31 at 34; Smith, "Contract Theory", *supra* note 32 at 388.

remedy, and towards a substance-procedure divide. In its most extreme formulation, remedies could be understood simply as rubber stamps on the decision made by substantive law. The impetus of Peter Birks's work seems, at times, to point in this direction.[40]

We shall not be concerned with the many other definitions that try to reconcile the concepts of right and remedy; suffice it here to outline the two most extreme theoretical positions.[41] To have those roles inform our "remedial imagination" helps us to set the stage for the second part of our inquiry: the civilian way of approaching rights and—if there is such a thing—remedies. Returning to our caveat about the normative and the empirical assessment of the common law approach, we can sum up as follows. The relationship between rights and remedies remains a matter of scholarly contention. We saw that in the ongoing theoretical debate a remedies-based monism and a rights-based dualism can be depicted as the two opposite poles of a continuum. It is not our task to answer the normative question of which approach is, as a matter of legal theory, the most consistent and convincing. Called upon as comparatists to give an assessment of the common law approach, the model of the continuum of theoretically possible approaches helps us to visualize what, empirically, can be considered the position of traditional common law discourse. Even if we concede that the common law had historically had more difficulties than the civilian tradition in embracing the "subjective right",[42] it was still rather comfortable with "duties"[43] and therefore is not at all completely agnostic regarding norms as pre-existing deontic entities. However, it is fair to say that common law pragmatism and its traditional thinking in terms of causes of actions has been biased towards the remedies-end of the continuum. Thus Vice Chancellor Sir Nicolas Browne-Wilkinson (as he then was) described the relationship between common law pragmatism and the position of a "remedial monism" in 1986:

> In the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action.

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40 See text accompanying note 122; Birks, "Rights, Wrongs", *supra* note 29.

41 See e.g. Yehuda Adar & Gabriela Shalev, "The Law of Remedies in a Mixed Jurisdiction: The Israeli Experience" (2008) 23 Tul Eur & Civ LF 111 (defining remedy as "an entitlement, *i.e.* a legal right," while, at the same time, "[f]rom the standpoint of the person entitled to the remedy (the aggrieved party), a remedy involves a practical benefit or advantage, awarded him for the sake of alleviating the grievance" at 114).

42 See e.g. Samuel, "English Law", *supra* note 7, *passim*.

43 See Atiyah, *supra* note 16 at 18. See also Lionel Smith, "Understanding Specific Performance" in Nili Cohen & Ewan McKendrick, eds, *Comparative Remedies for Breach of Contract* (Oxford: Hart, 2005) 221. Smith points out that OW Holmes—in the same article in which he denounces a deontic concept of right—spoke of a duty to perform a contract in case of specific performance being an available remedy (*ibid* at 223-24).

> It is not in accordance, as I understand it, with the principles of English law to analyse rights as being something separate from the remedy given to the individual.[44]

This pragmatism is not the pragmatism so dear to American theorists, in the sense of a philosophical denomination or a strain of legal theory.[45] It is a theoretically rather unreflective (and therefore probably the only truly pragmatic) pragmatism—the kind displayed by judges confronted with real cases, which leads to a kind of visceral "remedial monism".

Another valuable insight is that the common law theorists who gravitate towards the rights-end of the continuum are those who are inspired by the civil law. This is particularly obvious in the case of Peter Birks who, as a Romanist, has often expressed his affinity for the neatness of civilian taxonomic thinking.[46] This is an insight that finally leads our path to the civil law: it is indeed civilian taxonomy that hands us the key to understanding the main differences between the common law and the civil law approach to the rights-remedies relationship, which is, first of all, characterized, as we have seen, by the absence of remedy as a meaningful category in civilian private law discourse.[47]

III. The Civil Law: Rights and their Procedural Realization

A. Rights and Actions, not Rights and Remedies

1. Theoretical Structure: Procedure as the "Servant" of Substantive Law

Civilian private law discourse is traditionally centred upon the notion of the subjective right. The implications for our inquiry could be tentatively described as follows: all allocative decisions that private law is supposed to make—what belongs to whom and who owes what to whom—can eventually be expressed through a discourse of rights (entitlements, obligations, duties, and so forth).[48] These decisions are perceived as decisions of substantive law.

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[44] *Kingdom of Spain v Christie, Manson & Woods Ltd*, [1986] 1 WLR 1120 at 1129, 3 ALL ER 28.

[45] For a distinction between the two forms of pragmatism, see Posner, *supra* note 35 at ch 1 ("Pragmatism—Philosophical versus Everyday").

[46] See e.g. Peter Birks, "Definition and Division: A Meditation on *Institutes* 3.13" in Peter Birks, ed, *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 1.

[47] See Tallon, "Remedies", *supra* note 8.

[48] For the German civil law, see the splendid summary rendered by Wolfgang Zöllner, "Materielles Recht und ProzeBecht" (1990) 190 Archiv für die Civilistische Praxis 471.

How to now bridge the gap between norms and facts? Because (a) those who are on the negative side of (or who are *subjected to*) a subjective right—those under a duty or an obligation—do not always comply with their duties' deontic appeal of their own free accord; and because (b) except for narrowly defined cases of self-help, the state holds the monopoly on the use of force, the state has to provide an institutional system that ensures the enforcement and execution of subjective rights. Whereas subjective rights define the relations of private individuals and therefore amount to substantive private law, the body of law governing the administration of enforcement and execution procedures is a matter of public law.[49] Substance and procedure are to be strictly kept apart; procedure is relegated to the ancillary function of enforcing and executing substantive rights:[50] the action is the *"humble servante du droit subjectif substantiel."*[51]

Except for certain cases, such as dissolving marriage through a constitutive act, a judicial decision does not *create* a new legal situation,[52] but rather announces how the pre-existing legal relationship between the parties has to be properly understood.[53] Therefore, within the grid of the strict taxonomic separation of substantive law and procedure, the dichotomy that matters from the perspective of someone intent on enforcing her rights is not that of right and remedy, but that of right and action.

It goes without saying that this description is an oversimplification. Furthermore, we must not forget that the common law tradition, as mentioned above, separates substance and procedure as well, and is even familiar with the imagery of "servility"; as Lord Collins M.R. famously remarked: "the relation of the rules of practice to the work of justice is in-

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For France, see Serge Guinchard, Frédérique Ferrand & Cécile Chainais, *Procédure Civile*: *Droit interne et droit communautaire*, 29th ed (Paris: Dalloz, 2008) at paras 86ff.

49 See e.g. René Morel, *Traité élémentaire de procédure civile,* 2d ed (Paris: Recueil Sirey, 1949) at 6ff. For a more subtle distinction, however, see Loïc Cadiet & Emmanuel Jeuland, *Droit judiciaire privé,* 5th ed (Paris: Litec, 2006) at para 11.

50 Gérard Cornu & Jean Foyer, *Procédure civile* (Paris: Presses Universitaires de France, 1958) at 6. The role of procedure as a servant of substantive law is also underlined by Cadiet & Jeuland, *supra* note 49 at paras 8ff; Henry Solus & Roger Perrot, *Droit judiciaire privé*, t 1 (Paris: Sirey, 1961) at para 15.

51 Henri Motulsky, *Écrits: études et notes de procédure civile* (Paris: Dalloz, 1973) at 100 [emphasis added]. See also Cornu & Foyer, *supra* note 50 at 11.

52 And even in cases where a judicial decision does create a new legal situation, it does so because substantive law ascribes this function to the judicial decision.

53 A theorist might want to engage in a discussion on the question of whether the nature of the pre-existing right changes due to the approval of the court by means of novation, etc. The court order does command special respect, different rules of prescription apply, etc. For the English common law, see Birks, "Rights, Wrong", *supra* note 29 at 15.

tended to be that of handmaid rather than mistress".[54] Yet, as we have already seen, when it comes to the relationship of rights and remedies, the distinction is not easy to uphold—the separation of substance and procedure tends to "break down",[55] as Geoffrey Samuel put it, when common lawyers try to analyze what happens when a court administers a remedy.

Let us assume that, in contrast, the axiomatic starting point of the civil law is indeed a paradigm of rubber stamping; the role of the court, and of the law of procedure, is mainly to grant official verification to the existence of subjective rights, if need be through the use of force exerted by the state. Even if the rights of the disputants are far from easily discernable before proceedings are instigated—which is what usually brings people to court in the first place—the court only "finds" that substantive, pre-existing rights-duties relationships exist from the time of the occurrence of whatever causative event gave rise to the rights and duties in question. The body of public law that governs bringing an action has nothing to say as to the justification of the underlying substantive claim; the substantive law, in turn, is purged from all procedural implications.

2. Terminology: The Absence of "Remedy"

If we try to locate this approach in our model[56] it would occupy the most extreme possible position on the rights-end of the continuum. It becomes obvious why the civilian is challenged to ascribe a technical meaning to the notion of remedy; within the rights-actions framework there is no room for remedy as a technical term that combines features of substance and procedure.

This explains the absence of an exact equivalent in French terminology; André Tunc has suggested the use of the non-technical term *remède* as a translation for "remedy".[57] German civil law parlance also lacks an equivalent of remedy—*Behelf* or *"Rechtsbehelf"*[58] could be used as non-technical terms that could describe both a substantial entitlement as well as the possibility to have this right enforced in court. In that sense, *reme-*

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[54] *Re Coles and Ravenshear*, [1907] 1 KB 1 at 1, 4, [1907] 23 Times LR 32.

[55] Samuel, "Legal Remedies", *supra* note 4 at 40; Laycock, *supra* note 22.

[56] See Part II.2(b), above.

[57] André Tunc, "Preface" in Claude Lambrechts, ed and translator, *Code de Commerce Uniforme des États-Unis* (Paris: Armand Colin, 1971) at 17.

[58] For example, *Rechtsbehelf* is used as the translation of "remedy" in the official German language version of the *CISG*, see *Übereinkommen der Vereinten Nationen über Vertäge über den internationalen Warenkauf,* Bundesgesetzblatt 1989 II, 588 at 599. However, *Rechtsbehelf* is more commonly found in procedural terminology, signifying any means of realizing a right within the framework of orderly procedure.

dium only has a place in civil law thinking in its broadest and most non-distinct denotation: the idea of *remedium* as cure that refers to any response of the legal system to a grievance—a definition explicitly rejected by Birks for common law usage.[59] However, since the Continental civil law does not think in the terms of the Blackstonian rights-wrongs-remedies taxonomy (if a right is invaded, there is a wrong, which will be rectified by granting a remedy), the realization of a right is not seen as remedying a wrong—a cure that is being granted, administered by a court.[60] *Rechtsbehelf*, for example, also differs from remedy insofar as it denotes something of which one avails oneself: it is the means one uses to help oneself (*sich behelfen*) in order to obtain relief, rather than the cure (or remedy) itself.

In recent years, French authors have suggested using a common law–inspired remedial language (*remèdes*) when looking at the consequences of the non-execution of a contract.[61] The purpose was to break out of the taxonomic mould of the *Code civil*, assume a more pragmatist perspective, and ask what can be done for the creditor if the contract is not performed properly.[62] The remedial perspective and the remedial language used is an indicator of a civilian attempt to think more like a consequentialist, and more like a common lawyer. But beware of this apparent equivalence: despite the more consequentialist perspective, remedy as used in this way is merely a synonym of right or maybe remedial right, which lacks the procedural implications of remedy in common law parlance.

Thus, if we encounter the language of remedy in a civil law context, it is not to be understood as an analogue of the common law term remedy, particularly if it is supposed to signify a technically defined concept. If we encounter remedial language, in many instances it indicates that common law mentality has seeped into civilian thinking. One example is the recently published *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition*".[63]

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59 See Birks, "Rights, Wrongs", *supra* note 29 at 19ff.

60 See Hale, *supra* note 27; Blackstone, *Commentaries*, vol 1, *supra* note 27.

61 Denis Tallon, "L'inexécution du contrat: pour une autre présentation" [1994] RTD civ 223; Sophie LeGac-Pech, "Vers un droit des remèdes" (2007) 242 Petites Affiches 7.

62 See especially *ibid*.

63 Christian von Bar et al, eds, (Munich: Sellier, 2008). For a recent critical assessment, see e.g. Horst Eidenmüller et al, "The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems" (2008) 28:4 Oxford J Legal Stud 659. For the politics of European private law and contract law harmonization, *c.f.* EC, Commission, *A More Coherent European Contract Law: An Action Plan* (Bruxelles, 2003). See also Hugh Beale, "The Future of the Common Frame of Reference" (2007) 3:3 ERCL 257; Gert Brüggemeier et al, "Social Justice in European Contract Law: a Manifesto" (2004) 10:6 Eur LJ 653; Martijn W Hesselink, "The Politics of a European Civil Code" (2004) 10:6 Eur LJ 675.

Much has been written about its adoption of a civilian style of codification and a "German" sense of formalism.[64] However, its use of the language of remedies in Book Three, Chapter Three ("Remedies for Non-Performance"),[65] for example, can be traced back to earlier attempts to bridge the gap between civilian and common law thinking. The most prominent example of this ancestry is the *United Nations Convention on Contracts for the International Sale of Goods (CISG)*,[66] which speaks of "remedies for breach of contract"[67] and thus openly refers to the common law terminology and conceptualization of the non- or mal-performance of a contract. The *CISG* has exerted influence on the drafting and interpretation of the continental national codifications as well.[68] Surely this kind of cross-fertilization promotes "convergence", since using the terminology of a different legal tradition will open legal discourse to the ideas of the other. For now, however, we can summarize that remedy, as a technical term, does not fit well in the civilian dichotomy of substance and procedure, of right and action. Given this clear-cut separation of substance and procedure, the civil law has no room for an overlapping grey area that could amount to the "legal subject of remedies". The technocratic taxonomy of the civil law lacks the "remedial imagination" for such a fabulous chimera.

B. Origins

How do we account for this difference? Without postulating a simple relation of causality, we can link the position of the civil law tradition to the idiosyncrasies of its historical development. Again, we can only attempt to describe the tendency of the mainstream; in the civil law tradi-

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64 See e.g. Antoni Vaquer, "Farewell to Windscheid? Legal Concepts Present and Absent from the Draft Common Frame of Reference (DCFR)" (2009) 17:4 ERPL 487. See also Pierre Legrand, "Antivonbar" (2006) 1:1 J Comp L 13.

65 Von Bar et al, *supra* note 63 at 157ff. "Annex 1: Definitions" does not render a definition of remedy (*ibid* at 327ff). However, the definition of right mentions remedy: Right depending on the context, may mean "an entitlement to a particular remedy (as in a right to have performance of a contractual obligation judicially ordered)" (*ibid* at 341). However, at the same time, "the 'right to avoid' a contract" (*ibid*)—also explicitly named as an example of a right—due to fraud, coercion etc, is referred to as a *remedy* (Arts II-7:215, 7:216 at 133). See also Vaquer, *supra* note 64 at 495.

66 11 April 1980, 1489 UNTS 3, Can TS 1992 No 2 [*CISG*]. On the idea that the language of the *CISG* "spans all legal families" see Bruno Zeller, "International Trade Law—Problems of Language and Concepts?" (2003) 23:1 JL & Com 39 at 39.

67 *CISG* c II, s 3, arts 45ff ("[r]emedies for breach of contract by the seller"); *ibid* c III, s 3, arts 61ff ("[r]emedies for breach of contract by the buyer").

68 Peter Schlechtriem, "Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations" (2005) 10 Juridica International 27 at 27-36.

tion, with its prolific production of scholarly writing, there are many examples of views deviating from this mainstream, but I will be able to mention only a few.

1. A Tradition of Theorization

Let us start with the most general—and possibly most banal—observation. It is common comparative law–textbook fare that the development of the civil law has, at least since the renaissance of Roman law in the High Middle Ages, coincided with the rise of the university and has been driven by learned law professors.[69] "The teacher-scholar is the real protagonist of the civil law tradition," as John Merryman put it: "[t]he civil law is a law of the professors."[70] Those civil law scholars were by no means mere bloodless dwellers of the ivory tower, disconnected from practice: one of the effects of the scholars' role as the protagonists of legal development has always been their relative proximity to practice. As a matter of course, judges look at scholarly writing and accept it as authoritative; from the Middle Ages onwards, even towering academic figures such as Bartolus and Baldus regularly rendered their expert opinions in civil suits.[71] Nevertheless, it is easy to imagine that, because civilian discourse was propelled from the perspective of the scholar and teacher, its tendency has been far less outcome-oriented or "pragmatic" than the judge-driven discourse of the common law. This learned discourse, which became more and more infatuated with reason and the idea of law as normative system,[72] tended to approach the rights-remedies conundrum from the angle of rights rather than from the angle of practical outcomes, or remedies.

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69 See e.g. Stephan Kuttner, "The Revival of Jurisprudence" in Robert L Benson, Giles Constable & Carol D Lanham, eds, *Renaissance and Renewal in the Twelfth Century* (Cambridge, Mass: Harvard University Press, 1982) at 299ff.

70 John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3d ed (Stanford: Stanford University Press, 2007) at 56. See also Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed, translated by Tony Weir (Oxford: Oxford University Press, 1998); RC Van Caenegem, *European Law in the Past and the Future: Unity and Diversity over Two Millennia* (Cambridge: Cambridge University Press, 2002) at 44-48 ("[t]he English Bench is Paramount" as opposed to "The Continental Professor is Paramount" at 44-45). But for tendencies of a "*principe de pragmatisme"* in French civil law, bringing about a more important role of the judge as well, see William Baranès & Marie-Anne Frison-Roche, "Le souci de l'effectivité du droit" (1996) D Chron 301.

71 For an introductory overview, see e.g. Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) at 38ff [Stein, "Roman Law"].

72 See e.g. Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge, Mass: Harvard University Press 2005) at 17ff.

2. From the Roman Law of Actions to the Rise of the "Subjective Right"

The trajectory of this development might nonetheless be somewhat surprising given that the continental civil law developed within the framework of Roman law. Roman law—classical Roman law, that is—is said to be an "actional law".[73] Lacking a clear-cut distinction between substance and procedure, it does not distinguish between substantive right or claim, on the one hand, and procedural implementation or realization, on the other hand. Substantive entitlement was determined by the availability of a procedural remedy and took the form of the respective *actio*.[74] What mattered was the availability of a *formula*—indeed, *ubi remedium, ibi ius*.[75] As we have seen, this prevalence of procedure has long inspired scholars to point out the parallels between classical Roman law and the common law—given its roots in the system of writs; the similarity between writs and *formulae* seems simply too obvious to be ignored.[76]

Which path leads from such a way of thinking to the views of modern civil law? Looking at the development of the civil law tradition, we observe that there are two intertwined processes that both contribute to the modern primacy of substantive law: the growing conceptual separation of substance and procedure in legal thought, and the development of the concept of subjective right. It is a matter of contention whether the roots of both processes can be traced back to classical Roman law. Despite its actional character, we find texts that seem to imply that the Roman jurisprudes had already devised some concept of substance taking precedence over actional realization. The famous Celsus-fragment 44.7.51 in Justinian's *Digest* states that:

> *Nihil aliud est actio, quam ius quod sibi debeatur, iudicio persequendi.*
>
> An action is nothing else but the right to recover what is owed to us by means of a judicial proceeding [translated by author].

This is remarkable in two ways: Celsus refers to the *actio* as *ius*, as right, and at the same time conceptualizes the judicial proceedings as something to enforce a prior entitlement; he describes the latter not as right, but in the passive voice as *what is owed*. Yet what did Celsus mean by *ius*? It is tempting, from a modern perspective, to read the characteristics of our

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73 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) at 6.

74 See Horst Kaufmann, "Zur Geschichte des aktionenrechtlichen Denkens" (1964) 15 Juristenzeitung 482. See also Bernhard Windscheid, *Die Actio des römischen Civilrechts, vom Standpunkte des heutigen Rechts* (Düsseldorf: Julius Buddeus, 1856) at 3.

75 Zimmermann, *supra* note 73 at 6.

76 *C.f.* Pringsheim, *supra* note 17 at 358 ("the analogy is surprising").

understanding of right into the Roman *ius*. This modern perspective is, however, determined by a framework whose parameters have developed over time;[77] although the civilian still operates within the syntax of Roman private entitlements—*iura in rem et in personam*—right now comes with a plethora of connotations that centuries of philosophy and theology, natural law theory, and political science have amassed. The subjective right has different implications in an era that has witnessed the rise of the subject, the rise of the individual, and a new definition of the separation of the public and the private spheres.[78]

Michel Villey has accredited medieval nominalism, and especially the thought of William of Ockham, with first having imbued the Roman concept of *ius* with the idea of granting power to the individual.[79] This thesis has attracted ample criticism, particularly because of its postulate of a total, Copernican shift in meaning effected by Ockham and nominalist philosophy. This is contentious because even in classical Roman private law the term *ius* was deployed to denote some kind of individual entitlement, and was not solely used in the objective sense of "law".[80]

This is not the place to inquire into the minutiae of this debate. One detail, however, merits closer examination. As in so many learned disputes, the problem lies with the extreme formulation of the opposing positions. Of course, the rise of nominalism and individualism had to endow the idea of an individual entitlement with a whole new gravity and dynamic.[81] But that does not mean that, to earlier generations of jurists and

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77 Brian Tierney, "Villey, Ockham and the Origin of Individual Rights" in John Witte, Jr & Frank S Alexander, eds, *The Weightier Matters of the Law, Essays on Law and Religion: A Tribute to Harold J Berman* (Atlanta: Scholars Press, 1988) 1 at 4-5 ("[a]s we are so often told nowadays, all language is context-dependent. A legal term deployed in the cultural context of ancient Rome cannot have the same range of meanings as the term used nowadays (though the meanings may overlap)" at 5 [footnotes omitted]).

78 For a brief overview of the "academic career" of the term *ius*, see generally John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 206-10; Tierney, *supra* note 77 at 21ff, *et passim*.

79 Michel Villey, *La formation de la pensée juridique moderne: Cours d'histoire de la philosophie du droit*, 4th ed (Paris: no publisher, 1975) at 225-62 [Villey, "*Pensée juridique moderne*"]; Michel Villey, "L'idée du droit subjectif et les systèmes juridiques romains" (1946) 24 Revue historique de droit français & étranger (4th) 201.

80 Knut Wolfgang Nörr, "Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft" in Dieter Medicus, ed, *Festschrift für Hermann Lange zum 70. Geburtstag am 24. Januar 1992* (Stuttgart: Kohlhammer, 1992) 193 at 193-98; Tierney, *supra* note 77 at 17-21.

81 See generally Aaron Gurevich, *The Origins of European Individualism*, translated by Katharine Judelson (Oxford: Blackwell, 1995), at 89-99 *et passim*. On nominalist philosophy in particular, see Villey, *"Pensée juridique moderne"*, *supra* note 79 at 203ff. *C.f.*

to the Romans themselves, *ius* did not comprise a subjective dimension as well (in the sense of right). In short, to the Romans, *ius* did not exclusively denote "law" in an objective sense. This subjective, individual dimension may not have had the same metaphysical implications that some writers[82] seem to now ascribe to the term subjective right, but it emphasized the structure of private law as composed of relationships between individuals, between "subjects".[83] This was the framework for later civilian discourse, and surely was a main factor in the development of the concept of subjective right. Therefore, it is plausible to assume, as Geoffrey Samuel does, that a lack of Roman law scholarship in England is one of the reasons why the subjective right did not gain a foothold in English legal thought the way it did in Continental Europe.[84]

The same holds true for the division of substance and procedure. Classical Roman law was actional in its approach. However, the *Corpus Iuris Civilis*, in particular the *Digest*, the source for later civilian Roman law scholarship, devotes relatively little space to technical rules of procedure. Its discourse—its way of reasoning—rejoiced in proceeding from one hypothetical to the next, pushing an argument more and more to its extreme, while completely abstracting the discussed cases from real, decided cases, individual facts, and actual procedural settings. This is one of the most important differences between ancient Roman law and English common law.[85] Again, we do not know what kind of separation between substance

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H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 3d ed (Oxford: Oxford University Press, 2007) at 141.

82 See e.g. Samuel, "English Law", *supra* note 7 at 272ff.

83 See Charles Donahue, Jr, "*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney" in Domenico Maffei, ed, *A Ennio Cortese,* (Rome: Cigno, 2001) t 1 506. Donahue concedes that the Roman jurists did not put much effort into theoretically expounding a concept of subjective right, but underlines, by analyzing the usage of *ius* throughout the *Digest*, that they must have attached some subjective directionality to the notion of *ius* (*ibid* at 508ff). It is indeed rather obvious that since the very early stages of Roman law, there was a concept of an individual entitlement to the vindication of protected interests. This finding, however, hardly suffices to refute Villey's argument—it is hard to imagine that Villey was not aware of this most simple individualistic aspect of Roman private law. It is not likely that he was simply "laboring under a linguistic fallacy" (*ibid* at 529); the subjective right he claims to be an invention of the Middle Ages is a different concept, and it seems to be a concept devised to describe the novel understanding of the individual and its power in the Middle Ages.

84 Samuel, "English Law", *supra* note 7 at 269.

85 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (New York: Henry Holt & Co, 1864) at 36-38; WW Buckland & Arnold D McNair, *Roman Law & Common Law: A Comparison in Outline*, 2d rev ed by FH Lawson (Cambridge: Cambridge University Press, 1965) at 9ff. ("[r]oman common law was built up like ours by argument from case upon case, with

and procedure the Romans themselves experienced; we do not know whether Celsus's statement that an action is only the means to pursue what is owed to you already stood witness to the development of a theoretical dichotomy. However, these tendencies displayed in Roman law discourse surely facilitated later developments in the civil law.

Both the establishment of the substance-procedure divide and the rise of the subjective right not only coincide, but are also intertwined. It is interesting to note that one strain of the critique launched against Villey's claims about Ockham points towards the separation of substance and procedure as a factor in the ascendency of the subjective right: in writings as early as those of the Legists, the understanding of *actio* was starting to change.[86] Indeed, by the twelfth century, procedure had come to be seen as an autonomous discipline, drawing simultaneously from the sources of Roman and Canon law.[87] At this stage, however, there was still little impetus for a theoretical explanation of how both fields related to each other. It was in the sixteenth century that humanist Hugo Donellus defined the civilian substance-procedure dichotomy. Donellus took Justinian's definition of *actio* in *Institutes* 4.6.1 principium[88] as his starting point, which Justinian took, in turn, from Celsus's classical statement with which we are already familiar; drawing on this tradition, Donellus described the conceptual separation of a substantive *ius,* or right, and procedure as a means to pursue this right.[89] At this point, civilian legal science had, for the first time, established right and action as two separate entities.[90]

It is not a coincidence that both the ascendency of the subjective right and the growing rift between substance and procedure culminate in the heyday of individualism and find their most radical formulation in nineteenth-century German Pandectist scholarship, which influenced legal

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the difference that ours are decided cases and theirs are discussed cases, more open to dispute" at 9-10).

86 See Helmut Coing, "Zur Geschichte des Begriffs 'subjektives Recht'" in Helmut Coing, Frederick H Lawson & Kurt Grönfors, eds, *Das subjektive Recht und der Rechtsschutz der Persönlichkeit* (Frankfurt: Alfred Metzner, 1959) at 7ff.

87 See e.g. Stein, "Roman Law", *supra* note 71 at 57-59; Van Caenegem, *supra* note 70 at 48ff. On the romano-canonical procedure "in action", see James A Brundage, *The Medieval Origins of the Legal Profession, Canonists, Civilians, and Courts* (Chicago: University of Chicago Press, 2008) at 126ff.

88 "*Actio autem nihil aliud est, quam ius persequendi iudicio quod sibi debetur*."

89 Peter Stein, "Donellus and the Origins of the Modern Civil Law" in JA Ankum et al, eds, *Mélanges Felix Wubbe: offerts par ses collègues et ses amis à l'occasion de soixante-dixième anniversaire* (Fribourg: University Press Fribourg, 1993) 439 at 446ff.

90 Zöllner, *supra* note 48 at 472.

thought in all Continental jurisdictions, including France.[91] Individualist philosophy and "will theory", its legalistic expression, put the power of the individual in the very centre of nineteenth-century private law ideology, and figure prominently in the key works of scholars such as Savigny, Puchta, and Windscheid.[92] Private law demarcates spheres of individual freedom; it assigns, as Savigny put it in 1840, "the individual will a realm where it can reign unperturbed by any other will [translated by author]."[93] This sphere of individual freedom is synonymous with the subjective right: it is, again in Savigny's words, "the power of the individual person, a realm where his will reigns supreme [translated by author]."[94]

In the same period, Windscheid pushed the theoretical separation of substance and procedure to its doctrinal peak: in his famous and influential book *Die Actio des römischen Civilrechts, vom Standpunkte des heutigen Rechts*, Windscheid expounds the actional structure of Roman law and contrasts it with the modern perspective of the severance of substance and procedure. At the same time, he emphasizes the paramount importance of the concept of the subjective right, repeating almost verbatim Savigny's definition. From the perspective of nineteenth-century *ius commune*, Windscheid writes:

> the Right is the Prius, the action the subsequent, the Right is what creates, the action what is created. The Right assigns each individual the sphere in which his will posits law [*Gesetz*] for all other individuals; if the individual is not respected in this sphere, he may complain to the state, the guardian of Right [or law, or both; *Recht* also means "law" in the objective sense], and the state will help to obtain what is his. The legal order [*Rechtsordnung*] is an order of Rights [*Ordnung der Rechte*][translated by author].[95]

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91 See e.g. Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany*, translated by Tony Weir (Oxford: Clarendon Press, 1995) at 350.

92 For "will theory" as an expression of nineteenth-century legal consciousness, see Duncan Kennedy, "Two Globalizations of Law & Legal Thought: 1850-1968" (2003) 36:3 Suffolk UL Rev 631 at 637. Whether this legal consciousness is rooted in Kantian or Hegelian philosophy is still a matter of contention: see generally Helge Dedek, *Negative Haftung aus Vertrag* (Tübingen: Mohr Siebeck, 2007) at 101. See also James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) at 227.

93 Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Berlin: Veit und Comp, 1840) vol 1 at para 52 ("*dass dem individuellen Willen ein Gebiet angewiesen ist, in welchem er unabhängig von jedem fremden Willen zu herrschen hat*").

94 *Ibid* at para 59 ("*die der einzelnen Person zustehenden Macht, ein Gebiet, worin ihr Wille herrscht*").

95 Windscheid, *supra* note 74 at 3:

> *Für das heutige Rechtsbewußtsein ist das Recht das Prius, die Klage das Spätere, das Recht das Erzeugende, die Klage das Erzeugte. Das Recht weist*

Displaying elaborate Romanist technique, Windscheid "proves" that the judicial decision does not extinguish, replace, or even novate the initial substantive claim: here he devises, to put it simply, a theory of rubber stamping.[96] He particularly rejects the older theory that, as suggested by Savigny, *actio* itself is a right to "protection by the courts", namely the subjective right of an individual against another that, through the violation of this right, is transformed into a right to bring an action.[97] After Windscheid, the remaining overlap or intersection of substance and procedure was erased. Soon after, Oskar Bülow consummated the development of strict separation of substance and procedure by characterizing the relationship between the citizen and the court as a particular procedural relationship (*Prozeßrechtsverhältnis*), distinct from the subjective substantive right and exclusively a matter of public law.[98]

In France, codification had cemented the external separation of the subject matters of substantive private law (*Code civil,* 1804) and civil procedure (*Code de procédure,* 1806). The *Code de procédure*, the "younger sister" of the *Code Napoléon* and not quite as innovative, exerted major influence in Europe.[99] Yet, internally, subjective right and action, as the right's procedural implementation, were still seen as unified. The position put forward by Demolombe is paradigmatic: starting from Celsus's famous definition (in its version propounded in the *Institutes*), he postulates that the actional *"ius persequendi in iudicio quod nobis debetur"* is identical to the substantive right to *"quod nobis debetur"*. Here he falls back behind Donellus's interpretation of the action as a procedural vehicle for the

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> *jedem Individuum den Herrschaftskreis zu, in welchem sein Wille Gesetz für die anderen Individuen ist; wird das Individuum in diesem Herrschaftskreise nicht anerkannt, so darf es sich darüber bei dem Staate, dem Wächter des Rechtes, beschweren, beklagen, und der Staat hilft ihm zu dem Seinigen. Die Rechtsordnung ist die Ordnung der Rechte.*

96 *Ibid* at 112ff.

97 Savigny, *supra* note 93 at paras 204-205; Windscheid, *supra* note 74 at 1; Savigny speaks of "metamorphosis" (*supra* note 93 at para 204 [translated by author]). The use of the biological term gives an insight into the conceptualization of the subjective right as an entity that actually leads a life.

98 Oskar Bülow, *Die Lehre von den Proceßeinreden und die Proceßvoraussetzungen* (Gießen: Roth, 1868) at 2: "[*S*]*o gehört dieses Verhältniß selbstverständlicher Weise dem öffentlichen Recht an: der Proceß ist ein öffentlichrechtliches Verhältniß*." ("This relationship, as a matter of course, falls in the category of public law: procedure is a public law relationship" [translated by author]). See also Horst Konzen, *Rechtsverhältnisse zwischen Prozeßparteien* (Berlin: Duncker & Humblot, 1974) at 105.

99 CH van Rhee, "Introduction" in CH van Rhee, ed, *European Traditions in Civil Procedure* (Oxford: Intersentia, 2005) at 6. The *CPC* of 1806 incorporated major parts of the *Royal Ordinance on Civil Procedure* of 1667.

implementation of the substantive right. Very close to Savigny's formula of the action being "the right in a state of defense", Demolombe writes:

> L'action enfin, c'est le droit lui-même mis en mouvement; c'est le droit à l'état d'*action*, au lieu d'être à l'état de repos; le droit à l'état de guerre, au lieu d'être à l'état de paix.[100]

The strict separation of right and action had its breakthrough only in the twentieth century, championed by the works of Vizioz and Motulsky, who also adopted the language of labelling procedure as the servant of the substantive law.[101]

This master-servant imagery does not only have doctrinal implications; it speaks, on a more foundational level, to the supremacy of private law over public law, which is another hallmark of civilian thinking.[102] Procedure is an institution of public law that merely implements the preceding subjective private law rights. Legal philosopher Hans Kelsen pointed out how nineteenth-century legal thought understood this precedence of the subjective right over the procedural framework of its realization to be logical as well as temporal; the subjective rights of private individuals were thus endowed with metaphysical, ontological significance, above and beyond the positive law. While the objective—public—law(s), forms of government, and procedures of enforcement are ever changing, the subjective rights of the individual are pre-positive, almost natural, and therefore the very centre of the liberal, private law–based legal philosophy of the nineteenth century.[103]

It is important to be aware of the necessary simplification of discussing "the" civil law and its development, of the very broad brush strokes with which we depicted a tradition of two thousand years with its manifold local variations and permutations. In a legal culture of scholarly dispute, there are of course deviating opinions on this topic; they pertain to the precedence of rights over actions as well as the pre-eminence of the subjective right. For example, in 1927, German legal philosopher Julius Binder, from the angle of an extreme (and ideologically instrumental) consequentialism, took a remedies-before-rights approach and attempted to turn Windscheid's famous formulation on its head, postulating that it is

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[100] C Demolombe, *Cours de code civil* (Bruxelles: Meline, Cans et Compagnie, 1854) t 5 at para 338.

[101] See Cadiet & Jeuland, *supra* note 49 at para 317; Motulsky, *supra* note 51.

[102] Which, again, is not to say that the common law is not familiar with the image of the servant: *ibid* at 101.

[103] See Hans Kelsen, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* (Tübingen: JCB Mohr (Paul Siebeck), 1934) at 40-44 [Kelsen, *Reine Rechtslehre*].

the action that is the *prius,* whereas the right is the *posterius*.[104] Kelsen, a scholar of completely different ideological denomination than Binder, launched his well known attack against the subjective right in his *Pure Theory of Law*, first published in 1934. In Kelsen's extreme formulation of positivism, there is no room for a pre-positive subjective entitlement. Rights are merely a reflex of the objective order; they are the possibility the state offers to individuals to apply for a remedy that protects, first and foremost, the objective legal order.[105] Be this as it may, however influential Kelsen's ideas otherwise were, his theory of the subjective right never held much sway among civilian private lawyers and never entered the mainstream. The concept of subjective law was and is too ingrained in Continental private law thinking; it is not a coincidence that Kelsen was, by training, a scholar of public law.[106]

3. The Role of the Judge

Furthermore, the theoretical precedence of rights over actions ties in with the civilian paradigm of the judge "finding" law rather than "making" it. This paradigm provides that in order to find the law, norms, which, in a private law context, are mostly derived from codal provisions, are applied to the facts at hand. The norms are applied in what amounts to a syllogistical operation; they, not the judge, decide the case.[107] The process of "application" by the judge *ex post* only reveals what has been the "true" substantive relationship between the parties from the outset.

This, again, is an axiom rather than an actual belief held by judges and other legal actors. Its intellectual origins were partly a strict understanding of the separation of powers, which included the revolutionary thrust to limit the arbitrary power of the judiciary, and partly the fascina-

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[104] On Binder's politics, see Bernd Rüthers, *Geschönte Geschichten, Geschonte Biographien: Sozialisationskohorten in Wendeliteraturen, Ein Essay* (Tübingen: Mohr Siebeck, 2001) at 80ff. Binder's pragmatism was supposed to refute the theory of adjudication that assumed the judge was strictly bound by positive rules. In postulating that the judge was actually making the law, Binder in fact justified, in theoretical terms, an unrestricted reformulation of the law without democratic legitimation, according to the ascending National Socialist ideology. On the intellectual link between German scholars who supported National Socialist ideology and American pragmatism, see Hans Joas, *Pragmatism and Social Theory* (Chicago: University of Chicago Press, 1993) at 107; Posner, *supra* note 35 at 45; Julius Binder, *Prozess und Recht: ein Beitrag zur Lehre vom Rechtsschutzanspruch* (Leipzig: Deichert, 1927).

[105] Kelsen, *Reine Rechtslehre*, *supra* note 103 at 49-52.

[106] Kelsen's habilitation thesis (1911) focused on "*Hauptprobleme der Staatsrechtslehre*": Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Tübingen: JCB Mohr (Paul Siebeck), 1923).

[107] Merryman & Pérez-Perdomo, *supra* note 70 at 36.

tion with the code as a rational and scientific system that could predetermine judicial decision making.[108] We know of the early ill-conceived attempts in France and Prussia to even go so far as to outlaw judicial interpretation and to oblige judges to submit questions of interpretation to the legislature.[109] When the German Civil Code (*Bürgerliches Gesetzbuch*) came into force roughly a century after the French *Code civil*, the expectations as to how much work the codification could do for the judge had already been lowered considerably.[110] However, even nowadays, the paradigm persists that the judge applies law and does not make it. The style of how French judges still draft their judgments bears witness to how this paradigm is upheld: the brevity and peremptory phrasing follows the aesthetics of the judge as the mere "mouth"[111] of the code. And even though judges themselves might not truly believe in this stylized view of adjudication, the practice is upheld to keep up this very appearance.[112] Therefore, it is unsurprising that the methodological mainstream (leading treatises, etc.,) still maintain that judge-made law is indeed not law at all: case law, *jurisprudence*, even if it is *constante* (*ständige Rechtsprechung*) is accepted as an authority in the sense that as a matter of *fact,* lower courts are likely to adhere to the path chosen by higher courts, and practitioners, to phrase their arguments accordingly.[113] It is not, however, a "source of law", since it is only an interpretation of the positive norms.[114]

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[108] For an account of the revolutionary attempts to limit the power of the judiciary, see e.g. John P Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968) at 375ff; Barry Nicholas, *The French Law of Contract*, 2d ed (Oxford: Clarendon PressOxford University Press, 1992) at 10. For the roots of the code as a national and scientific system, see Berkowitz, *supra* note 72.

[109] Dawson, *supra* note 108 at 376. Merryman & Pérez-Perdomo, *supra* note 70 at 39.

[110] "Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich 1" (1888) 14-17, translated by and reprinted in James Gordley & Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials* (Cambridge: Cambridge University Press, 2006) 61.

[111] Charles de Montesquieu, *De l'esprit des lois* (London: no publisher, 1768) at 327. Dawson, *supra* note 108 at 407ff.

[112] *C.f.* Mitchel de S-O-l'E Lasser, "Judicial (Self-) Portraits: Judicial Discourse in the French Legal System" (1994) 104:6 Yale LJ 1325 at 1334, 1343ff (contrast of the "official," and the "unofficial" French portrait of the civil judge).

[113] It is very telling that probably the most widely-used and most frequently cited German treatise on legal methodology uses the term "judge-made law" (*Richterrecht*) only in quotation marks to emphasize that it is not a source of law: Karl Larenz & Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft*, 3d ed (Berlin: Springer, 1995) at 252-53, 255, 258.

[114] *Ibid* at 252-61; Dawson, *supra* note 108 at 400ff; Nicholas, *supra* note 108 at 12-19; Jean Carbonnier, *Droit civil*, t 1 (Paris: Presses Universitaires de France, 2004) ("[l]a jurisprudence apparaît ainsi comme une habitude des tribunaux"at para 31). See also The Honourable Madame Justice Claire L'Heureux-Dubé, Justice of the Supreme Court

Besides the fact that this conceptualization of the role of the judge links back to our earlier point that the judge in the civil law is simply not as important a figure as in the common law tradition, it is easy to see how this fact is, on a theoretical level, connected to the idea of sanctioning pre-existing rights rather than creating rights through granting a remedy.[115] If the judge, rather than making law, "finds" the law (in an objective sense), she also "finds" the parties' subjective rights.

IV. Some Comparative Remarks

A. "Finding" Law and "Making" Rights: Equity, Good Faith, and Discretionary Awards

Although it is not widely reflected upon at a conscious level, this model of the rights-action dichotomy might be too much part of civilian private law folklore to be uprooted by a sidewind of lofty scholarship, such as Kelsen's fundamental attack launched from the position of a public law scholar.[116] However on a less foundational level, the civilian model has an obvious open flank. Even if one believes in the precedence of rights over actions (or "remedies" if you will), one has to wonder about the practicability of the strict conceptual separation. Private law rights are not ends in themselves; of what use, after all, are rights without remedies, substantive entitlements without any means of realization, if people do not comply with them? Does it not make sense to keep an eye on the possible enforcement of a right while discussing its substantive merits?

On a theoretical level, it is, of course, easier for a codified system to create rights without a remedy—rights that cannot be enforced in court. A code or statute can simply posit that a right exists, even if no remedy is being offered in case of its violation (*lex imperfecta*).[117] From a strictly positivist perspective, the possibility of enforcement is not a requirement to acknowledge a norm as granting a legal right; it is sufficient that the sovereign so commands. Conversely, in a system that is strictly based on

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of Canada, "By Reason of Authority or by Authority of Reason" (1993) 27:1 UBCL Rev 1 at 9ff.

115 See Part II.2(a), above.

116 See Kelsen, *Reine Rechtslehre*, *supra* note 103.

117 Guinchard, Ferrand & Chainais name the concept "*obligation naturelle*" as an example of a right without a corresponding action; however, the natural obligation is an obligation that cannot be enforced because there is no substantive right to demand performance—which is why the obligation is just "natural" and not "legal" (*supra* note 48 at para 87; art 1554 CCQ; art 656 BGB). Again, the Roman position was different insofar as the procedural and the substantive were not separated, but see Zimmermann, *supra* note 73 at 7ff.

precedent, musings about rights that do not lead to remedial relief would per se only be *obiter dicta* and would not, in a technical sense, create law.

However, even if there are no theoretical objections against creating rights without remedies—even if civilians are said to be less "pragmatic" than the common lawyer—it is not because civilians have been completely impervious to arguments of practicality. We recall Jhering's statement that a right that cannot be realized is nothing but words, nothing but a legal phantom.[118] If we want to understand how a right actually operates and fulfills its purpose, it is inevitable that we assume a more holistic, or, as we called it earlier, a more "monist" perspective, a perspective that includes procedural implementation and enforcement. What is first disentangled and divided by a theory of strict separation between substance and procedure has to be reunited in order to comprehend the legal process; civilian authors have therefore criticized the dichotomy of substance and procedure as impractical and artificial.[119]

The postulate of the primacy of substantive law over procedural laws, which entails that substantive rights somehow exist before the judge can find them and see to their proper enforcement, obviously marginalizes what judges actually do and is counterintuitive to any insight of even an undogmatic legal realism. The artificiality of the theoretical assumption becomes particularly conspicuous in cases where the judicial decision involves an obvious degree of latitude.

In the common law, working from the paradigm of a strong, law-creating judge, it seems clear that there are situations in which the availability of a remedy—of a court order—is partly or even entirely within the discretion of the court. Equitable remedies are the most obvious example. Historically, one of the reasons for the English law's preference for remedies over rights has been the role of equity.[120] Even in modern, *rights-based* common law scholarship, we still find reverberations of the peculiar distinction between law and equity: if the availability of a court order is in the court's discretion, argues Stephen Smith, there can be no substantive right against the court to obtain such an order; for example, to the specific performance of a contract. If the court exercises its discretion by granting

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[118] R von Jhering, *L'esprit du droit romain dans les diverses phases de son développement*, t 3, 3d ed, translated by O de Meulenaere (Paris: Marescq, 1887) at para 43.

[119] Zöllner, *supra* note 48 at 482ff; Guinchard, Ferrand & Chanais, *supra* note 48 at para 88; Marie-Anne Frison-Roche, "La procédure de l'effectivité des droits substantiels" in Florence Benoît-Rohmer & Constance Grewe, eds, *Procédure(s) et effectivité des droits* (Bruxelles: Nemesis, 2003) 1; Cornu & Foyer, *supra* note 50 at 12. For similar tendencies in the common law, see Thomas O Main, "Overcoming the Substance-Procedure Dichotomy" (2009), online: ExpressO <http://works.bepress.com/thomas_main/1>.

[120] Atiyah, *supra* note 16 at 21ff.

the order, it just so happens that it *replicates* an initial right to have the contract performed.[121] Peter Birks held similar views regarding court orders that are "strongly discretionary": "the discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants ordered."[122]

Birks's approach to the rights-remedies relationship seems, however, more civilian—an inclination that expresses itself in a tendency to perceive what a court does as mostly confirming pre-existing rights. In order to be able to categorize the maximum number of cases as cases where the court thus confirms the plaintiff's rights, Birks distinguishes between strong and weak discretion. "Orders for specific performance and for injunctions and all others rooted in the Court of Chancery are", according to Birks, "weakly discretionary": because "[t]he discretion has been settled over centuries",[123] it can be determined whether a person has a right to an equitable remedy.

Again, the civilian approach is even more extreme. When it comes to the adjudication of substantive rights, there is no such thing as discretion. Institutionally, the civil law has simply not retained any equivalent to the equitable jurisdiction of the Court of Chancery. Of course, comparatists would bring up the concept of good faith (*bona fides*, *bonne foi*, *Treu und Glauben*) as a functional equivalent; and to be sure, on a *substantive* level, both equity and good faith serve to temper and correct respectively the harsh results of the strict common and civil laws.[124] Again, if we focus on the historical roots, we might detect certain commonalities between the Chancelor's correction of the common law and the *praetor's* exceptions to the older *ius civile*.[125] However, according to the civilian purist conceptualization of the separation of powers, all judicial decisions as to the substantive law have to be made as a matter of right; there is no room for discretion in the sense of a residue of a judicial prerogative to arbitrariness. Thus, in procedural terms, good faith is not connected to a notion of judicial discretion equal to the discretionary power that is associated with equity in English law. The idea that the judge finds law—that is, reveals the rights existing between the parties—implies that there can be no legal vacuum to be filled by judicial discretion. This belief in norms and rights

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121 Smith, "Damages", *supra* note 31 at 44ff.

122 Birks, "Rights, Wrongs", *supra* note 29 at 16.

123 *Ibid*.

124 Martin Josef Schermaier, "*Bona Fides* in Roman Contract Law" in Reinhard Zimmermann & Simon Whittaker, eds, *Good Faith in European Contract Law* (Cambridge: Cambridge University Press, 2000) 63.

125 *Ibid* at 65.

as the foundation of all justice, this extreme legalistic view, is anathema to the idea of equity as a judicial freedom, equity as famously characterized by Roscoe Pound as "justice *without* law".[126]

Of course, in a decision that involves recourse to the principle of good faith as a corrective of what seems to be an unfair outcome, the judge has, as a matter of fact, a great degree of latitude. However, it is important to understand that as a matter of law, the civilian paradigm still demands that the judge merely find a duty of, or *exceptio* grounded in, good faith, and that the party benefitting from such emanations of good faith does so as a matter of right. Despite the fact that in matters involving good faith, decisions may vary widely depending on the particular judge's personal or political convictions, German civil law scholarship insists, even nowadays, that in theory there can only be *one* right decision: this is the decision preordained by substantive law, which has to be found properly by the sitting judge.[127]

The same theoretical axiom is applied in another context, which figures prominently in the works of Stephen Smith—namely, the award of damages. Smith is particularly interested in oddities such as nominal and punitive damages, and damages for non-pecuniary loss. Smith writes that, in such cases, it is the court that creates a right to the awarded damages. The law that governs the award of damages gives rise to a right on the part of the plaintiff; such a right, however, is directed against the court rather than against the defendant.[128] In other words, at the time of the occurrence of the event that gives rise to a right to compensation—a tort is committed, a contract breached—a right to a certain award of damages cannot yet come into existence since it has to be determined by the court after the fact and it is almost unpredictable beforehand, even for legal experts specializing in the field.[129] For the civilian, this is once more merely a factual complication. The fact that it is almost impossible to accurately predict the sum eventually granted by the court has no impact on the theoretical assumption that the right to the sum eventually awarded came into existence in the very same moment the (secondary) right to compensation was born—the moment the tort was committed or the con-

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[126] Roscoe Pound, "The Decadence of Equity" (1905) 5:1 Colum L Rev 20 [emphasis added].

[127] Barbara Stickelbrock, *Inhalt und Grenzen richterlichen Ermessens im Zivilprozess* (Cologne: Otto Schmidt, 2002) at 274.

[128] Smith, "Damages", *supra* note 31 at 55-60.

[129] *Ibid* at 59:

> This conclusion is consistent with another feature of pain and suffering awards, it is usually not possible to determine in advance, even roughly, the amount that a court will order by way of a pain and suffering award unless one has detailed knowledge of the relevant law (and often not even then).

tract was breached. Since this right existed from the very occurrence of such a causative event, there is also no true discretionary element involved in the judicial decision; again, possibly diverging assessments by different individual judges or different instances are merely factual deviations.[130] Since the right came into existence as a right between obligor and obligee, the right is a right against another citizen and not a right against the court. Of course, even civilian procedural scholarship assumes that when an action is brought, the plaintiff has some sort of a subjective right against the court. However, it is not a substantive right to damages as assumed by Smith, but a procedural right to be heard, to be granted fair treatment, and to receive the proper application of legal rules.[131] Civil law scholarship has given up on the idea of an actional right against the court that somehow mirrors the subjective substantive right of the plaintiff since the days of Demolombe and Savigny. Smith is surprisingly close to Savigny's position—which is, by all means, a compliment, even for a common lawyer.[132]

To the legal realist, of course, the idea of "finding the law"—particularly in cases in which the human factor in adjudication is obvious—might seem far-fetched, even ludicrous. Finding the "right answer" in hard cases might be practically superhuman, but we might remind ourselves that it is an assumption well known even among common lawyers that this task is not unthinkable on a theoretical level.[133] In regard to our initial question, we can conclude that the law of damages, in the civil law, defines a right to damages as a sanction of a violation of a primary right, which is eventually confirmed by the court in a court order. Damages are

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[130] Stickelbrock, *supra* note 127 at 380.

[131] Motulsky's thesis supports the idea of "*l'action*" as a subjective procedural right (*supra* note 51). *Contra* Guinchard, Ferrand & Chainais, *supra* note 48 at para 9; Georges Rouhette, "L'influence en France de la science allemande du procès civil et du code de procédure civile allemand" in Walther J Habscheid, ed, *Das deutsche Zivilprozessrecht und seine Ausstrahlung auf andere Rechtsordnungen* (Bielefeld: Gieseking, 1991) 159; Georges Wiederkehr, "La notion d'action en justice selon l'article 30 du nouveau Code de procédure civile" in *Mélanges offerts à Pierre Hébraud* (Toulouse: Université des Sciences Sociales de Toulouse, 1981) 949. On the German *Prozessrechtsverhältnis* that is purely conceptualized as a public law relationship, see Bülow, *supra* note 98; Konzen *supra* note 98.

[132] *C.f.* Frederick Pollock, *Principles of Contract: Being a Treatise on General Principles Concerning the Validity of Agreements in the Law of England and America*, 4th ed (Philadelphia: Blackstone, 1888) (describing his experience when turning to the "immortal work of Savigny; assuredly the greatest production of this age in the field of jurisprudence, nor one easily to be matched in any other branch of learning, if literary form as well as scientific genius is taken into account. Like one in a Platonic fable, I passed out of a cave of shadows into clear daylight" at 5-6).

[133] Ronald Dworkin, "Hard Cases" (1974) 88:6 Harv L Rev 1057.

not a remedy in the sense that the court order itself is in any way a causative event that reshapes the plaintiff's initial right to damages or even originally generates it; neither, therefore, is the plaintiff's right directed against the court.[134]

B. Specific Performance

Perhaps the most prominent example of how "remedial imaginations" diverge is the conceptualization of the specific performance of a contract. Given the abundance of literature on the topic, I can limit myself to a few comparative remarks that, again, will remind us that what we are used to thinking of as "the" position of a legal system regarding any doctrinal question is simply a snapshot of a certain state of development at a certain moment in time.

Specific performance is an instance of diverging reactions to the breach or non-performance (or mal-performance) of a contract. In the common law,[135] a decree for specific performance is thought of as an equitable remedy; it is a judicial order whose availability is (at least to a certain degree) within the court's discretion and that presupposes that no adequate remedy exists at law (i.e., damages are not sufficient to properly compensate for the loss suffered).[136] In the civil law, however, specific performance is said to be the primary, the most readily available remedy.[137] The civil law seeks to enforce the contractual promise, since it focuses on the moral duty to keep a promise;[138] whereas the more business-minded, pragmatic common law, as goes the standard explanation, typically sees a contract as a market transaction that the parties enter into for their financial benefit, and as such, perceives monetary damages to be the most

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[134] Again, this reflects the opinion of modern scholarly mainstream. Interestingly enough, at the end of the nineteenth century, scholars held that in cases of measuring damages the judge constitutively shapes the right to damages: see Stickelbrock, *supra* note 127 at 379ff.

[135] See e.g. The Honourable Mr Justice Robert J Sharpe, *Injunctions and Specific Performance* (Aurora, Ont: Canada Law Book, 2008) at para 7.10ff [Sharpe, *Injunctions*]; John D McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 906ff; Edwin Peel, ed, *Treitel on the Law of Contract*, 12th ed (London: Sweet & Maxwell, 2007) at paras 21-016ff.

[136] Sharpe, *Injunctions*, *supra* note 135 at para 7.50ff.

[137] For possible meanings of such a statement, *c.f.* Louis J Romero, "Specific Performance of Contracts in Comparative Law: Some Preliminary Observations" (1986) 27:4 C de D 785 at 792ff.

[138] Georges Ripert, *La règle morale dans les obligations civiles*, 4th ed (Paris: Librairie générale de droit et de jurisprudence, 1949) at para 22.

adequate way to compensate for breach.[139] Indeed, it is not easy to explain the secondary role of specific performance in common law from the perspective of a rights-based approach that acknowledges the duty to keep one's word as the primary obligation arising from a contract.[140]

Much has been written about whether there is a tendency of convergence between the common law and the civil law in their preferred remedies, or whether the theoretical preference for specific performance in the civil law actually translates into a preference that is measurable in empirical terms.[141] For us, however, it is more interesting to take a closer look at the underlying doctrinal construction, for it is quite telling in respect to how civilians and common lawyers think differently about the relationship between rights and remedies. In the civil law, a court order for specific performance does not create a new right or replicate an old one. The court merely confirms what is thought of as the first and foremost right flowing from a contract: the right to receive what has been promised. Thus, it is the primary right itself that is being realized, and not a secondary right, which is caused by a wrong. Enforcing a contract, to a civilian, means the confirmation of the primary right to performance, which is identified with the contract itself. It is important to note that this model strictly separates the perspective of substantive law and the perspective of procedure and execution. The fact that, in many instances, contractual duties cannot be enforced due to their particular content does not dimin-

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139 See e.g. Robert J Sharpe, "Specific Relief for Contract Breach" in Barry J Reiter & John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths, 1980) 123 at 139, citing E Allan Farnsworth, "Legal Remedies for Breach of Contract" (1970) 70:7 Colum L Rev 1145:

> The common law's remedial response to contract breach has been strongly influenced by the economic philosophy of free enterprise. In order to facilitate and encourage commercial activity, the common law has tended to restrict rather than enlarge the responsibility of the party in breach, and has 'shown a marked solicitude for men who do not keep their promises.' Upon analysis, it is clear that this attitude stems not from a blind eye to dishonesty, but from a desire to encourage the maximization of profit and commercial activity in an open market economy [footnote omitted].

See also, Peter Linzer, "On the Amorality of Contract Remedies: Efficiency, Equity, and the Second Restatement" (1981) 81:1 Colum L Rev 111.

140 See e.g. Stephen A Smith, "Performance, Punishment and the Nature of Contractual Obligations" (1997) 60:3 Mod L Rev 360.

141 See generally Romero, *supra* note 137 at 794; Florence Bellivier & Ruth Sefton-Green, "Force obligatoire et exécution en nature du contrat en droits français et anglais: bonnes et mauvaises surprises du comparatisme" in Gilles Goubeaux et al, eds, *Études offertes à Jacques Ghestin: Le contrat au début du XXIe siècle* (Paris: Librairie générale de droit et de jurisprudence, 2001) 91; Henrik Lando & Caspar Rose, "The Myth of Specific Performance in Civil Law Countries", (21 November 2003) online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=462700>.

ish the almost *logical* appeal of the primary right to performance being the theoretical starting point of the enforcement of a contract. Yves-Marie Laithier describes the position of the mainstream as follows:

> Cessant d'être un moyen, l'exécution forcée en nature est devenue une fin. Faisant appel à ... l'article 1142 du Code civil, on prétend qu'il est de l'*essence* de l'obligation contractuelle d'être exécutée en nature, que c'est la seule sanction capable de « réaliser » tant le droit subjectif du créancier que le droit objectif ... [S]e libérer en versant des dommages-intérêts en lieu et place de la prestation promise, c'est l'autoriser à modifier unilatéralement l'objet de l'obligation.[142]

This reminds us to be cautious when addressing specific performance in the civil law as "remedy". Although it is surely possible to use the term in a very broad and non-technical (a comparatist might say functional) way, we must keep in mind that the term does not have the same implications for the civilian and the common lawyer. When we call civil law specific performance a remedy, we should be aware that in the civil law it is not a response to a wrong, that it is not a "cure". We should be aware that for the civilian, specific performance refers to the content of a substantive primary right, not to the content of a court order. We should be aware that a court order confirming this primary right is, first of all, simply a statement that the plaintiff holds this right; it does not automatically entail an injunction.[143] In light of these differences, we might wonder whether calling civilian specific performance a remedy does more harm than good.

On a different note, however, the peculiar history of specific performance reminds us of how substance and procedure, rights and remedies can be separated conceptually, but are genealogically connected and interwoven. The supremacy of the right to performance in the civil law is a relatively recent development; classical Roman law of procedure knew nothing of specific performance, and therefore, one can assume that the primary obligation to perform a contract did not have the same content or importance ascribed to it today.[144] The medieval concept *nemo praecise cogi ad factum* limited the actual availability of the specific enforcement of obligations; however, it exerted influence on the theory of obligations and rights as well, as is reflected in the idea that an obligation to do or not

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[142] Yves-Marie Laithier, *Étude comparative des sanctions de l'inexécution du contrat* (Paris: Montchrestien, 2004) at 44-45 [emphasis in original, footnotes omitted].

[143] Romero, *supra* note 137 at 788ff.

[144] George Vlavianos, "Specific Performance in the Civil Law: Mediating Between Inconsistent Principles Inherited from a Roman-Canonical Tradition via the French *Astreinte* and the Québec Injunction" (1993) 24:1 RGD 515 at 518ff.

to do "resolves itself" into an obligation to pay damages.[145] This is also apparent in the Pandectist notion that the content of every obligation is a duty to perform in kind and, eventually, to pay an equivalent in damages.[146] In France, it was only the judicial creation of the *astreinte*, developed in the early nineteenth century, that established specific performance as a primary remedy.[147] Only the interplay of many factors—from the rise of the subjective right and will theory as the reigning paradigm of private law to the internal separation of procedure and substance and the development of actual procedural means of enforcement—has brought about the current theoretical supremacy of the right to specific performance. In the life of the law, substance and procedure, right and remedy have shaped each other reciprocally. To ask which one precedes, in a historical sense, is indeed, as Zakrzewski put it, to ask which came first: the chicken or the egg.[148]

The positions of the civil law and the common law traditions are defined by their historically determined conceptualization of the relationship between substance and procedure, right and remedy, and right and action. It is this insight that makes us realize that the pure civilian position can hardly be upheld in an environment where the substantive law is civilian, but the law of procedure is of common law origin; where judges have to interpret a code, but have the importance and self-image of common law judges.[149] Our inquiry has briefly outlined the terminological as well as the theoretical disparities between the common law and civil law traditions. This helps us understand the tension that is inevitable when both traditions clash, as is the case in Quebec.[150] The unavoidable tension is palpable in recent cases such as *Construction Belcourt Ltée v. Golden Griddle Pancake House Ltd.*,[151] where the court struggled with the primacy-of-rights approach of the civil law and the connotations evoked by the term injunction, to which the court kept referring as an "equitable

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145 Art 1142 C civ.

146 See Dedek, *supra* note 92 at 138ff.

147 See Vlavianos, *supra* note 144 at 529ff.

148 See Zakrzewski, *supra* note 5 at 57.

149 Daniel Jutras, "Culture et droit processuel: Le cas du Québec" (2009) 54:2 McGill LJ 273 at 286.

150 *Ibid* at 273ff. Jutras describes the Quebec legal culture of procedure as a hybrid that is characterized by a plurality of different legal cultures rather than a homogenous mixture. He identifies, for example, a prevalent North American (rather than Continental-European) professional culture, and at the same time a normative culture that is characterized by a resurgence of the Quebec Civilian heritage (*ibid* at 288ff).

151 [1988] RJQ 716 (CS) (available on WL Can).

remedy".[152] In this context Pierre Bienvenu has aptly summed up in one simple catchphrase the epistemological difference between a common law remedy and a procedural means to realize a subjective right in the civilian sense: "*L'injonction mandatoire: véritable* remedy *ou simple procédure*."[153] In recent years, judges in Quebec have been increasingly willing to interpret and develop Quebec civil law within the larger context of the civilian tradition, as shown by the evolving case law on good faith. It seems to be in line with this development that, in its approach to specific performance, Quebec law has managed to assign to the "injunction" the function of servant of the substantive right to performance—or, in the words of Bienvenu, as *simple procédure*—and not that of an equitable remedy in the common law sense.[154]

Conclusion

Let us return to the question before us and to our initial tentative answer: Has our inquiry added more evidence in favour of our hypothesis that remedies precede rights in the common law, and that rights precede remedies in the civil law? The short answer to the short question might be "yes", but only if we accept that the notions of "remedy" and "(subjective) right" do not, traditionally, have the same meaning for common lawyers and civilians. In other words, if we accept that, in the civil law, rights do not precede remedies in an ontological or historical way, but that the idea of such precedence is itself the result of a complex historical and contingent process.

The lesson to be learned, once more, is to take legal language, to take differences between legal terminologies seriously. Indeed, as Denis Tallon remarked, such differences are always indicative of larger and more deep-seated divergences.[155] The lack of "remedy" in the vocabulary of the civil law is more than just a matter of different labelling; it is the expression of a different way of thinking about law. As we observed at the beginning of our inquiry, translating the ideal into the real is a complex task, common to every legal system, that binds its adjudicative bodies through preformulated norms. Only if a legal system is capable of satisfactorily trans-

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[152] Art 751 CCP.

[153] Pierre Bienvenu, "Pour l'injonction mandatoire comme recours d'exécution en nature: Quelques réflections d'un practicien" (1989) 20:1 RGD 65 at 72 [emphasis in original].

[154] See e.g. *Aubrais c Laval (Ville de),* [1996] RJQ 2239 (CS) (available on QL); *Varnet UK Ltd c Varnet Software Corp,* [1994] RJQ 2755, 59 CPR (3d) 29 (CA); *Gosselin c Rock Forest (Ville de),* [1991] RJQ 1000 (CA) (available on QL); Bienvenu, *supra* note 153; Rosalie Jukier, "The Emergence of Specific Performance as a Major Remedy in Quebec Law" (1987) 47:1 R du B 47.

[155] Tallon, "Remedies", *supra* note 8 at 263ff.

posing the abstract discourse of the law into social reality is justice carried out; only then does the legal machinery fulfill its purpose. Due to the (literally) pivotal importance of this translational process, the way it is cast into legal concepts allows for an insight into the remaining epistemological differences between the legal traditions of the West. In a mixed jurisdiction, where those traditions meet, mingle, and clash, the understanding of these differences is not just a matter of academic interest. A thorough exploration of what is "in the mix" is necessary to understand the condition of a mixed jurisdiction, and to define its future course.